YEOH ENG KONG v. GOH BAK MING & ORS

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[CIVIL SUIT NO: 22NCVC-1384-11-2012]
16 APRIL 2015

CIVIL PROCEDURE: *Discovery – Application for – Discovery, inspection and production of Investigative Due Diligence Report – Whether confidential solicitor-client communication – Whether produced in contemplation of legal proceedings – Whether privileged document – Whether privilege waived – Whether probative value outweighed prejudicial effect – Whether report protected from disclosure*

EVIDENCE: *Documentary evidence – Privileged document – Application for discovery, inspection and production of Investigative Due Diligence Report – Whether confidential solicitor-client communication – Whether produced in contemplation of legal proceedings – Whether report protected from disclosure – Evidence Act 1950, ss. 126 & 129*

The plaintiff filed an interlocutory application against the 15th defendant for discovery, inspection and production of the Investigative Due Diligence Report ('the investigative report') prepared by Messrs Megat Najmuddin Leong & Co for the 15th defendant. The plaintiff, in the original action, sued the first to seventh defendants for conspiracy to injure the plaintiff by causing the 16th defendant, a subsidiary of the 15th defendant, to enter into a questionable distribution agreement. The plaintiff was then a shareholder and director of the 15th defendant and the chief operating officer of the 16th defendant. The investigative report disclosed alleged breaches under the Penal Code and Companies Act 1965 by several identified individuals to the detriment of the company and consequently the 15th defendant made a police report and a written complaint to the Companies Commission of Malaysia ('CCM'). In reply to the plaintiff's request for a copy of the investigative report, the 15th defendant required the plaintiff to furnish the indemnity in order to avoid any risk of exposure to the company for action by others that were not within the control of the 15th defendant. Nevertheless, the 15th defendant permitted the plaintiff, as director, to view the investigative report and take his own personal notes. The plaintiff submitted that the investigative report was relevant to the issues at the trial and would significantly bolster the plaintiff's case. However, the 15th defendant submitted that the investigative report was a privileged document pursuant to the Evidence Act 1950 ('the Act') as it was a solicitor-client communication and also under the common law as it was produced in contemplation of legal proceedings.

Held (allowing application in part):

(1) The investigative report was relevant to the issues at trial but that did not *ipso facto* automatically entitle the plaintiff to have the document discovered, inspected and produced for the ultimate tendering as evidence for the trial. The investigative report was plainly a confidential solicitor-client communication as it was produced by a firm of advocates and solicitors on the specific instruction of the client. Hence, the investigative report was protected from disclosure by virtue of the legal professional privilege. (paras 14 & 17)

(2) The privileged document would only be subject to disclosure if there was express consent of the client pre-trial or if the client volunteers the evidence as a witness at trial. It was immaterial if the document was disclosed to third parties. Hence, the disclosure by client is protected by s. 129 of the Act. (paras 18 & 19)

(3) The 15th defendant had not, at all material times, consented to the disclosure of the investigative report. The preview of the document by the plaintiff *per se* did not constitute express consent to disclosure on the part of the 15th defendant by reason that the plaintiff had the right to view it as a then director of the 15th defendant. The 15th defendant's action was merely an offer to waive privilege but not in itself an express consent of disclosure. If the plaintiff had accepted the offer through the furnishing of the indemnity, the express consent would be deemed obtained. Since the offer was not accepted by the plaintiff in the last five years plus, the offer had lapsed by reason that the reasonable time to do so had already long expired. (paras 20 & 21)

(4) The report had been solely prepared for purposes of the audit committee of the 15th defendant and thus, the ultimate dominant purpose must have been for the audit committee's deliberation of contemplated institution of legal proceedings involving both criminal prosecution and civil litigation, if justified to do so. This was plainly borne out from the subsequent conduct of the 15th defendant such as making the police report as well as complaint to the CCM. Therefore, the investigative report had been clothed with common law litigation privilege and the principles of waiver of privilege that require express consent should not be different from that of ss. 126 and 129 of the Act. (para 22)

(5) The court exercised its power pursuant to O. 24 r. 13(2) of the Rules of Court 2012 and inspected the investigative report which comprised of three volumes. The court also, in its exercise of discretion pertaining to the reception of evidence in civil cases, is entitled to take into account the probative value versus the prejudicial effect of the evidence. The contents of vol. 1 were primarily the legal opinion of Messrs Megat Najmuddin Leong & Co and were preliminary in nature. Hence, it was of limited cogency and was not necessary for the fair disposal of the

action and was also inadmissible in evidence. As vol. 1 of the report was of low probative value and did not outweigh the prejudicial effect, its disclosure was refused. (paras 24, 25, 26, 32 & 33)

(6) The legal professional privilege and the common law litigation privilege only attached to vol. 1 and not vols. 2 and 3 of the investigative report. The documents had already pre-existed the making of the legal opinion and did not become privileged merely because they were handed to the solicitor who made the legal opinion. The documents were plainly severable from vol. 1 and may be relevant for the purposes of the trial and the plaintiff therefore had the right to have them produced and inspected. (paras 29 & 34)

Case(s) referred to:
Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***
Datuk Seri Tiong King Sing v. Datuk Seri Ong Tee Keat & Anor [2014] 1 LNS 1073 CA ***(refd)***
Dr Pritam Singh v. Yap Hong Choon [2006] 4 CLJ 759 CA ***(refd)***
Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40 ***(refd)***
Ventouris v. Mountain (The Italia Express) [1991] 3 All ER 472 ***(refd)***
Waugh v. British Railways Board [1980] AC 521 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 45, 46, 47, 48, 49, 50, 51, 126, 128, 129
Rules of Court 2012, O. 24 rr. 12, 13(2)

Other source(s) referred to:
Augustine Paul, *Evidence Practice and Procedure*, 4th edn, p 1073

For the plaintiff - Mohd Izral Mohamed Khairy (Bhuvaneswary Supramaniam with him); M/s Izral Partnership
For the 15th defendant - Arjan Pursumal; M/s Vasdev Bakshani & Assocs

Reported by S Barathi

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is an interlocutory application (encl. 141) brought by the plaintiff against the fifteenth defendant in the original action for discovery, inspection and production of the investigative due diligence report prepared by Messrs Megat Najmuddin Leong & Co, Advocates & Solicitors ("investigative report") presently in the possession of the fifteenth defendant.

[2] The plaintiff has in the original action, *inter alia*, sued the first to seventh defendants for conspiracy to injure the plaintiff by causing the sixteenth defendant, a subsidiary of the fifteenth defendant to enter into a questionable distribution agreement with the thirteenth defendant to market

health products produced by the fourteenth defendant. The plaintiff was then a shareholder and director of the fifteenth defendant and the chief operating officer of the sixteenth defendant.

[3] The trial of the original action commenced on 29 January 2015 and the balance has been postponed to 18 to 29 May 2015.

[4] The affidavits filed by the parties for purposes of this application are:

(i) plaintiff's sixth affidavit affirmed by Yeoh Eng Kong on 11 December 2014;

(ii) plaintiff's eighth affidavit affirmed by Yeoh Eng Kong on 22 January 2015;

(iii) fifteenth defendant's affidavit in reply (1) affirmed by Azhar Mohamad Dahlal on 27 January 2015;

(iv) plaintiff's ninth affidavit affirmed by Yeoh Eng Kong on 27 January 2015; and

(v) plaintiff's eleventh affidavit affirmed by Yeoh Eng Kong on 3 March 2015.

[5] After having read the written submissions filed by the parties, I heard counsel on 5 and 25 March 2015.

Salient Facts

[6] The fifteenth defendant has in June 2008 appointed by Messrs Megat Najmuddin Leong & Co to conduct a legal due diligence and investigation on the distribution agreement and related transactions involving the sixteenth defendant. Subsequent thereto, the investigative report was produced to the audit committee of the fifteenth defendant.

[7] On 27 August 2008, the fifteenth defendant made a general announcement to the Bursa Malaysia Bhd that the company received the investigative report and the board of directors had accepted and adopted the recommended courses of action to pursue. Since the investigative report disclosed alleged breaches under the Penal Code and Companies Act 1965 by several identified individuals to the detriment of the company, the fifteenth defendant would make appropriate reports to the Polis DiRaja Malaysia, Securities Commission Malaysia, Companies Commission Malaysia and commence appropriate civil suit against the identified individuals.

[8] The fifteenth defendant on 29 August 2008 made the police report. In addition the fifteenth defendant on 14 November 2008 made a written complaint to the Companies Commission Malaysia.

[9] The plaintiff as a director of the fifteenth defendant on 29 May 2009 wrote to the fifteenth defendant to request for a copy of the investigative report. The fifteenth defendant replied to the plaintiff on 5 June 2009

requiring the plaintiff to furnish the indemnity required by Messrs Megat Najmuddin Leong & Co before a copy of the investigative report could be given to the plaintiff in order to avoid any risk of exposure to the company for action by others that are not within the control of the fifteenth defendant. Nevertheless the fifteenth defendant permitted the plaintiff as director to have access to the contents of the investigative report.

[10] Accordingly the plaintiff viewed the investigative report at Messrs Megat Najmuddin Leong & Co's office in July 2009 and took his own personal notes.

[11] Until the hearing of this application, the plaintiff has however not provided the required indemnity to the fifteenth defendant.

Contentions Of The Plaintiff

[12] The plaintiff's submission in gist is that the investigative report is relevant to the issues at trial and would significantly bolster the plaintiff's case. The plaintiff cited and relied on O. 24 r. 12 of the Rules of Court 2012 which reads:

> 12. Order for production to Court (O. 24 r. 12)
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> (1) At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter that falls within one of the following descriptions:
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> (a) documents on which the party relies or will rely;
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> (b) documents which could -
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> (i) adversely affect a party's case; or
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> (ii) support a party's case; and
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> (c) documents which may lead to a series of inquiry resulting in the obtaining of information which may -
>
> (i) adversely affect a party's case; or
>
> (ii) support a party's case.
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> (2) The Court may deal with the documents when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.

Contentions Of The Fifteenth Defendant

[13] In opposing the application, the fifteenth defendant in gist submitted that the investigative report is a privileged document pursuant to the Evidence Act 1950 because it was a solicitor-client communication as well as under the common law following *Waugh v. British Railways Board* [1980] AC 521 which was adopted by the Court of Appeal in *Dr Pritam Singh v. Yap Hong Choon* [2006] 4 CLJ 759; [2007] 1 MLJ 31 because it was also produced in contemplation of legal proceedings.

A

Findings Of The Court

[14] *Prima facie*, I have no doubt that the investigative report is relevant to the issues at trial but that does not *ipso facto* automatically entitles the plaintiff to have the document discovered, inspected and produced for the ultimate tendering as evidence for the trial.

B

[15] I will firstly deal with the point of privilege raised by the fifteenth defendant by reason that the investigative report is in substance a solicitor-client communication. The relevant provisions are found in s. 126, s. 128 and s. 129 of the Evidence Act 1950 which provide:

C

126. Professional Communications

(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

D

Provided that nothing in this section shall protect from disclosure:

E

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

F

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

128. Privilege not waived by volunteering evidence

If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.

G

129. Confidential communications with legal advisers

H

No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

I

[16] In the Federal Court case of *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14, Nik Hashim FCJ in dealing with s. 126 of the Evidence Act said the following: A

> [18] These two questions arose as a result of the findings of the Court of Appeal which held that the High Court was erroneous to hold that once the legal opinion was privileged, it would remain so forever, even if it was published to third parties. The Court of Appeal further ruled that confidentiality is an essential requirement in s. 126 (see para. 33 of the judgment), and found on the facts of this case that the communication by the appellant to the advocate was not intended to be confidential (see paras. 34-49) and therefore the privilege under s. 126 does not apply (see para. 32) and cited *Emperor v. Mariane G Rodrigues* [1903] 5 Bombay LR 122 in support. B C
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> [19] To lend support to the above findings the respondents submitted that the principle at common law 'once privileged, always privileged' does not extend the privilege to protect a communication which is not confidential or has subsequently lost its confidentiality. The principle of confidentiality is co-extensive with that of legal professional privilege under the section. There can be no privilege without confidentiality. Once confidence ceases privilege ceases. D
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> [20] With respect, I do not agree. I agree with the appellant that the Court of Appeal, in taking the 'loss of confidentiality' approach to determine loss of privilege, had failed to recognise the common law maxim 'once privileged, always privileged' (see per Cockburn CJ in *Bullock & Co v. Corry & Co* (1878) 3 QBD 356 at p. 358) as being embodied in ss. 126-129 of the Act. This common law maxim has been endorsed and approved by the high authority of the House of Lords and Privy Council in the cases quoted earlier where the privilege was accepted as being absolute. The maxim has hitherto been followed in Malaysia as seen in the High Court case of *Dato' Au Ba Chi v. Koh Keng Kheng & Ors* [1988] 1 LNS 188; [1989] 3 MLJ 445 which was adopted by the learned trial judge in the present case. Relying on the wording of s. 126 of the Act, Eusoff Chin J (as he then was) in *Dato' Au Ba*'s case held the maxim 'once privileged always privileged' applied. The court said at p 447: E F G
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> > Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock v. Corry & Co*)…
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> [24] It is true that a legal opinion sought is implicitly confidential but the exception under s. 126 has nothing to do with loss of confidentiality elsewhere but with whether the privilege holder ie, the client is prepared to waive the privilege for the court proceedings. It is the privilege that has to be waived and not the confidentiality. Thus, the finding of the Court of Appeal in treating 'privilege' as being co-extensive with 'confidentiality' is untenable. H I
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> [25] Hence, I hold that the legal professional privilege under s. 126 of the Act is absolute and it remains so until waived by the privilege holder, ie, the client.

[17] The investigative report here is plainly a confidential solicitor-client communication as it was produced by a firm of advocates and solicitors on the specific instruction of the client. Hence I find and hold that the investigative document is protected from disclosure by virtue of legal professional privilege.

[18] I noted that the plaintiff has argued that even if the investigative report is privileged, the fifteenth defendant had waived that privilege. In this regard, the plaintiff submitted that s. 126 and the rules on waiver thereunder as elucidated in *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* (*supra*) applied only to disclosure by the advocate but not by the client as is the case herein. I am however of the view the disclosure by the client is likewise protected by s. 129 of the Evidence Act. I draw support from the textbook *Evidence Practice and Procedure*, 4th edn by Augustine Paul FCJ where His Lordship said the following at p. 1073:

> The privilege given by sections 126 to 128 of the Act would be meaningless if the client himself is not protected from disclosure of such communications. Thus this section provides that no one shall be compelled to disclose to the court any confidential communication which has taken place against him and his legal adviser. However, if he offers himself as a witness he may be compelled to disclose any such communications necessary to explain any evidence which he has given, but no others.

[19] It is therefore clear that the privileged document would only be subject to disclosure if there was express consent of the client pre-trial or if the client volunteers the evidence as a witness at trial. It is also immaterial if the document was disclosed to third parties.

[20] In this context, the plaintiff argued that the fifteenth defendant had previously permitted the plaintiff to view the document and thereafter expressly consented to the disclosure of the investigative report by the fifteenth defendant's willingness to produce the document subject to the plaintiff providing the indemnity to Messrs Megat Najmuddin Leong & Co *vide* the fifteenth defendant's letter of 5 June 2009. In my view, the preview of the document by the plaintiff *per se* did not constitute express consent on the part of the fifteenth defendant by reason that the plaintiff had the right to view it as a then director of the fifteenth defendant. From my review of the correspondences that took place between the parties in May-June 2009, I construe the fifteenth defendant's action as merely an offer to waive privilege but not in itself an express consent of disclosure. If the offer has been accepted by the plaintiff through the furnishing of the indemnity, then express consent would be deem obtained. Since the offer was not accepted by the plaintiff in the last five years plus, my view is that the offer had lapsed by reason that the reasonable time to do so already long expired.

[21] Thus I find and hold that the fifteenth defendant had at all material times not expressly consented to the disclosure of the investigative report.

[22] Since I have found that the investigative report is a solicitor-client communication that attracted the application of s. 129 of the Evidence Act 1950, it is strictly unnecessary for me to consider whether it also attracted common law litigation privilege. Although it was expressed in Messrs Megat Najmuddin Leong & Co's letter dated 4 June 1999 that the report was solely prepared for purposes of the Audit Committee of the fifteenth defendant, my view is that the ultimate dominant purpose must have been for the Audit Committee's deliberation of contemplated institution of legal proceedings involving both criminal prosecution and civil litigation, if justified to do so. This is plainly borne out from the subsequent conduct of the fifteenth defendant such as making the police report as well as complaint to the Companies Commission Malaysia. Consequently I find and hold that the investigative report has also been clothed with common law litigation privilege. Furthermore, I am of the view that the principles on waiver of privilege that require express consent should be no different here from that of ss. 126 and 129 of the Evidence Act 1950 as discussed hereinabove.

[23] In any event, the decision as to whether to order disclosure is a discretionary one. In this regard, there is also O. 24 r. 13 of the Rules of Court 2012 that provides:

> 13. Production to be ordered only if necessary (O. 24 r. 13)
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> (1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.
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> (2) Where on an application under this Order for production of any document for inspection or to the Court, privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

[24] In this regard, I have exercised the power available to me under O. 24 r. 13(2) and inspected the investigative report furnished to me by the fifteenth defendant. I noted that the investigative report in fact comprised of three volumes, to wit: vol. 1 being the due diligence report conducted by Messrs Megat Najmuddin Leong & Co and vols. 2 and 3 being the verification notes made up of general corporate secretarial documents of the fifteenth and sixteenth defendants, documents related to the questionable transaction between the sixteenth defendant and fourteenth defendant and other relevant documents of the fifteenth and sixteenth defendants furnished by the fifteenth defendant to Messrs Megat Najmuddin Leong & Co for the undertaking of the due diligence.

[25] Besides O. 24 r. 13 of the Rules of Court 2012, it seems to me that the court in its exercise of discretion pertaining to the reception of evidence in civil cases is further entitled to take into account the probative value

versus the prejudicial effect of the evidence as seen in recent the Court of Appeal case of *Datuk Seri Tiong King Sing v. Datuk Seri Ong Tee Keat & Anor* [2014] 1 LNS 1073.

[26] From my inspection of the investigative report, the contents in vol. 1 in gist are primarily the legal opinion of Messrs Megat Najmuddin Leong & Co on causes and courses of action available to the fifteenth defendant. In addition the legal opinion appears to be preliminary in nature since it is based on the information made available by the fifteenth defendant as well as subject to further impending interview with relevant personnel. Hence it is of limited cogency. It is in addition my view that the legal opinion is not necessary for the fair disposal of the action if not also inadmissible in evidence for not being within the provisions of ss. 45 to 51 of the Evidence Act 1950. Ultimately, the legal opinion is to my mind duplicative of the function of the court. This court is best left to independently determine the pleaded case from the evidence adduced at the trial aided by legal submission of counsel uninfluenced by any legal opinion. In short, the investigative report is of low probative value.

[27] There is on the other hand possible prejudicial effect as well by reason that the fifteenth defendant had forwarded the investigative reports to the appropriate authorities for action to be taken. The investigation by the authorities appears to be still ongoing. Although the exact repercussion that may result is not known from the affidavits adduced, I rather err against disclosure if the probative value and the prejudicial effect evenly balances out each other as is seemingly the case herein.

[28] Since the investigative report comprised of both legal opinion and documents used to support the opinion, I note that in the English Court of Appeal case of *Ventouris v. Mountain (The Italia Express)* [1991] 3 All ER 472, Bingham LJ said the following at pp. 480 - 485:

> *The court was not, however, referred to any authority beyond those I have just mentioned and never addressed the principle that a pre-existing document not entitled to privilege does not become privileged merely because it is handed to a solicitor for purposes of litigation* … I can see no reason why a pre-existing document obtained by the solicitor for purposes of litigation should be privileged from production and inspection, save perhaps in *Lyell v. Kennedy (No 3)* (1884) 27 Ch D 1, [1881-5] All ER Rep 814 situation which, in an age of indiscriminate photocopying, cannot often occur. I find nothing of the cases which suggests, let alone justifies, such as result. Such a rule would in my view pose a threat to the administration of justice … While the court's ultimate concern must always to be to ensure the fair disposal of the cause or matter, it need not be unmindful of other legitimate concerns nor is it powerless to control the terms upon which production and inspection may be ordered. I would not wish it thought that because, as I conclude, production and inspection may be ordered therefore they may at once be ordered unconditionally. (emphasis added)

This case has been followed by the Court of Appeal in *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40.

[29] Though I am mindful that the Federal Court in *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* (*supra*) recognised and applied the maxim 'once privileged, always privileged', I observed that it was extended to the differentiation between the loss of privilege and loss of confidentiality on close reading of that case in repelling the co-extensiveness argument of legal professional privilege and confidentiality. I do not think that this applies to the situation that if part of a document is privileged, the entire document becomes automatically privileged if the rest of it is not privileged and severable. In this respect and notwithstanding my findings of privilege attaching to the investigative report in paras. 17 and 22 hereinabove, it is my view that the legal professional privilege and the common law litigation privilege only attached to vol. 1 but not vols. 2 and 3 of the investigative report. This is because these documents already pre-existed the making of the legal opinion and do not become privileged merely because they were handed to the solicitor who made the legal opinion.

Conclusion

[30] To summarise, I find that only vol. 1 of the investigative report is subject to legal professional privilege under s. 129 of the Evidence Act 1950 as well as common law litigation privilege.

[31] I find and hold that the fifteenth defendant had at all material times not given express consent to the plaintiff and did not thereby waive the privilege.

[32] Even if the privilege has been waived, I find and hold that vol. 1 of the investigative report is not necessary for the fair disposal of the action besides being of low probative value that does not outweigh the prejudicial effect.

[33] I therefore refuse the disclosure of vol. 1 of the investigative report.

[34] That notwithstanding, the documents in vols. 2 and 3 that are plainly severable from vol. 1 of the investigative report may be relevant for purposes of the trial of this action and the plaintiff has therefore the right to have them produced and inspected.

[35] In the premises, I allow prayer 2 of the plaintiff's application in respect of vols. 2 and 3 of the investigative report only with costs to be in the cause. Liberty is also given to both parties to apply.